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State of Utah v. Darrell Lawrence Wessendorf : Brief of Respondent

Utah Court of Appeals

R. Paul Van Dam; Attorney General; Barbara Bearnson; Assistant Attorney General; Attorneys for Plaintiff-Respondent.
J. Macarthur Wright; Attorney for Defendant-Appellant.

DOCKET NO. 880358-CA IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff-Respondent,	:	Case No. ~~880186-CA~~ 880358 CA
v.	:	
DARRELL LAWRENCE WESSENDORF,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF MANSLAUGHTER IN VIOLATION OF UTAH CODE ANN. § 76-5-205 (SUPP. 1987) IN THE FIFTH DISTRICT COURT, IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. PHILLIP EVES, JUDGE, PRESIDING.

R. PAUL VAN DAM
Attorney General
BARBARA BEARNSON
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Respondent

J. MACARTHUR WRIGHT
60 North 300 East, P.O. Box 339
St. George, Utah 84770
Attorney for Appellant

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60 North 300 East, P.O. Box 339
St. George, Utah 84770
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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of manslaughter in violation of Utah Code Ann. § 76-5-205 (Supp. 1987) following a trial to the bench in Fifth District Court, in and for Washington County, the Honorable J. Phillip Eves, Judge, presiding. This Court has jurisdiction of this appeal under Utah Code Ann. § 78-2a-3(2)(e) (1987) and Utah Code Ann. § 77-35-26(2)(a) (Supp. 1988).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether the evidence established that defendant was reckless in holding the snake in such proximity to the victim as to allow it to strike, and is thus guilty of manslaughter.

2. Whether the defendant should be excused from responsibility in the homicide as the result of the medical treatment provided to the victim in an effort to save her life.

STATEMENT OF THE CASE

Defendant, Darrell Lawrence Wessendorf, was charged with murder in the second degree in violation of Utah Code Ann.

§ 76-5-203 (Supp. 1987). He was convicted, following a bench trial, of the lesser-included offense of manslaughter, a second degree felony in violation of Utah Code Ann. § 76-5-205 (Supp. 1987). He was sentenced to a term of not less than one nor more than fifteen years in the Utah State Prison; he was also ordered to pay $922 in restitution for the funeral expenses of Stevie Kirkwood.

STATEMENT OF FACTS

On the morning of May 7, 1987, Willis Kelton picked up defendant at the home of Jeri Ann and Marshall Kirkwood in LaVerkin, Utah, where defendant rented an upstairs room (T. 17, 381). Kelton and defendant then traveled toward Cedar City to pay an open container ticket when defendant spotted a great basin rattlesnake coiled up beside the road (T. 20, 289, 388-89). At defendant's request, Kelton pulled over to the side of the road, allowing defendant to capture the snake (T. 289, 389). Using a jackhandle retrieved from Kelton's truck, defendant put pressure on the snake's head and, after a short struggle, imprisoned the snake in a plastic gunnysack (T. 289, 389).

Kelton and defendant then returned to the Kirkwood home where defendant tied the sack containing the snake in a tree on the east side of the house (T. 390). Defendant asked Ms. Kirkwood, who had been observing defendant from the doorway of her home, to move the sack to the other side of the tree if the sun began to beat down on it (T. 19, 306, 390). Ms. Kirkwood refused to even touch the sack and strongly suggested defendant tie it to a tree on the south wide of the house (T. 19, 306,

390). After moving the snake, as requested by Ms. Kirkwood, defendant and Kelton left for Cedar City a second time that morning, somewhere between 10:30 and 11:00 a.m. (T. 391). Not long after defendant and Kelton departed, Ms. Kirkwood left with her daughter, Stevie, and a friend to spend a few hours in St. George (T. 21, 395).

Upon arriving in Cedar City, defendant and Kelton took care of their business at the police station and then stayed around to "drag main" a couple of times (T. 391). On their way out of town, defendant and Kelton stopped at the liquor store to purchase a bottle of tequila (T. 392, 394). Defendant and Kelton proceeded to share the bottle on their return to LaVerkin (T. 392).

When defendant arrived back at the Kirkwood home, he released the snake (T. 310-311, 390). The snake was about forty-two inches long; James LeRoy Glen, a research serpentologist with the Veterans Administration Hospital, has "seen probably more great basin rattlesnakes than anybody today that's alive," and the largest one he has seen was forty-six inches (T. 486). The snake tried to crawl off a few times and coiled up every time it was approached by dogs running loose in the yard (T. 310-311). As a result, defendant mostly sat with the snake coiled up underneath his leg away from the dogs (T. 311, 394). Sitting out under the shade tree, defendant and Kelton finished off the bottle of tequila and waited for Ms. Kirkwood's return (T. 291, 394).

Ms. Kirkwood returned home about 3:00 p.m. and was confronted by defendant holding the snake with it hanging around his neck and moving around his body (T. 21, 43, 395). Defendant proceeded to tease Ms. Kirkwood in an attempt to get her to touch or hold the snake. Defendant persisted in this conduct even after it became apparent that Ms. Kirkwood was frightened by the snake (T. 21-22, 97-98, 291, 314-315, 395, 431).

In addition to Ms. Kirkwood, defendant approached several friends and neighbors of Ms. Kirkwood, as well as children just returning home from school (T. 23-26, 291-92, 313-314, 395-99). Concerned by defendant's conduct, Ms. Kirkwood ordered her six year old son, Lyle, who had just returned home from school, to go to a neighbor's house for safety (T. 23, 46, 292, 396, 431). Stevie, Ms. Kirkwood's 2-year-old daughter, was told to go to her bedroom and play where she would be out of sight of defendant (T. 47).

Ms. Kirkwood then walked across the street to the Church residence (T. 25, 430). Defendant followed with the snake draped across his neck (T. 98). Walter Church warned defendant that the snake was dangerous and that "it could bite and kill someone" (T. 26, 83). Defendant disregarded this warning and told Mr. Church not to worry about it (T. 397-98). Allowing the snake to crawl loose around his neck, defendant performed antics with the snake for on-lookers who came along (T. 313, 398-99).

Later, when most everyone had gone, defendant took the snake into the Kirkwood home over the objections of Ms. Kirkwood (T. 28, 295, 399-401). Defendant stood in the doorway of the

Kirkwood home with the snake draped across his shoulders, preventing Ms. Kirkwood access to the house unless she consented to touch or hold the snake (T. 28, 295, 332). Because of her concern for Stevie, Ms. Kirkwood ran around the house and climbed through her bedroom window (T. 28-29, 295).

With the snake still draped across his shoulders, defendant entered the Kirkwood home through the front entrance and proceeded to the bathroom where Stevie was playing with a kitten (T. 29, 295, 401-02, 429, 562). While Stevie was still holding the kitten in her right hand, defendant took her left hand and stroked the snake with it (T. 402). Stepping around behind Stevie, defendant next draped the tail of the snake over Stevie's left shoulder and the main body over Stevie's left arm and hand (T. 402). Stevie screamed and tried to get away from defendant (T. 296, 320). Defendant attempted to take the kitten away from Stevie so that he could place both of her hands on the snake and have Stevie kiss the snake (T. 369-70, 403, 426, 566-67). Defendant stuck the snake in her face and at times held the snake's head within four inches of Stevie's face (T. 295, 321, 565).

Meanwhile, Ms. Kirkwood had obtained a gun from her bedroom and had started toward the bathroom (T. 29). Upon seeing the snake draped across Stevie, Ms. Kirkwood ordered defendant to remove the snake immediately (T. 29, 35, 403-04, 430, 567). Defendant ignored Ms. Kirkwood and continued to allow the snake to stay on Stevie's shoulder. Ms. Kirkwood demanded that defendant remove the snake a second and third time (T. 35, 57).

Finally, defendant turned to look at Ms. Kirkwood and felt the snake "hunker up" in his hand (T. 404, 565-66). By the time defendant focused his attention back on Stevie, the snake had attached to her neck (T. 30, 322, 336, 404-05, 565-66). At that moment, defendant's hand was at least four to five inches from the snake's head (T. 565).

After realizing that Stevie had been bitten, defendant peeled the snake's fangs out of her shoulder (T. 30, 366, 405). After dropping the gun in the hallway, Ms. Kirkwood attempted to retrieve her daughter, but defendant slammed shut the bathroom door (T. 30, 405). Defendant lacerated Stevie's shoulder and attempted to suck the snake venom from the wound (T. 405, 563). Ms. Kirkwood immediately called the police and then went outside and shot the snake (T. 30, 60, 407-08). Upon hearing the shot, defendant emerged from the house carrying Stevie (T. 31). Ms. Kirkwood managed to free Stevie from defendant's grasp and placed her in the car in preparation for the drive to the hospital (T. 31). A scuffle developed between defendant and Kelton which considerably delayed Ms. Kirkwood's departure (T. 31-33, 66, 410). Ms. Kirkwood needed someone to assist her in getting to the hospital and asked Kelton to go with her (T. 31, 67). However, defendant attacked Kelton in an effort to prevent him from going to the hospital with Ms. Kirkwood (T. 31, 67-68, 412-13). When Ms. Kirkwood attempted to assist Kelton, defendant shoved her to the ground (T. 31, 68, 413). Officer Drolc arrived in time to witness defendant's treatment of Ms. Kirkwood (T. 31-32). Defendant backed off, allowing Ms. Kirkwood and Kelton to leave with Stevie for the hospital (T. 32).

Upon Stevie's arrival in the emergency room, she was treated by four physicians (T. 193). The doctors began the administration of antivenin through an intravenous line; three vials were put into the IV solution (T. 107-08). Stevie showed clinical signs of improvement, but then suddenly, prior to the completion of the administration of the antivenin, suffered respiratory and cardiac arrest. Despite vigorous efforts to save her life, Stevie Kirkwood died (T. 108, 195).

Dr. Edwin Sweeney, Utah State Medical Examiner, conducted an autopsy and determined that the cause of death was venomous snakebite (T. 160).

Defendant claimed at trial that if rattlesnakes are "properly handled and [not] startled, that they're perfectly harmless" (T. 387). However, defendant admitted that he knew the snake was poisonous and that it could bite (T. 428). He intentionally took the snake into the bathroom where Stevie was playing with kittens and draped the snake across her shoulder (T. 428-29).

Defendant was aware that if the snake were startled, it could strike (T. 434). He knew the snake had previously reacted to animals; in fact, it had reacted to his dog, causing defendant to "flip [the snake] in the head" (T. 434). Regardless, he exposed the snake to Stevie while she was handling the kittens.

Defendant also claimed that he has never heard of anyone dying from a rattlesnake bite (T. 436). He believed, however, that a rattlesnake bite was like a "concentrated" bee sting, and he had heard of people dying from bee stings (T. 436).

Following the presentation of the evidence, the court found defendant not guilty of second degree murder and found him guilty of the crime of manslaughter (R. 260).

SUMMARY OF THE ARGUMENT

Defendant was aware of a substantial and unjustifiable risk in exposing the poisonous rattlesnake to the 21-month old victim, Stevie Kirkwood, in this case. Defendant disregarded the risk when he draped the snake over Stevie's shoulder and stuck the snake within four inches of her face. Defendant knew the snake was poisonous and in fact had been warned earlier that day to get rid of the snake because it could kill someone. Even when viewed from defendant's stand point, an ordinary person would not have failed to have perceived the risk. Defendant's conduct meets the standard of recklessness and he is, therefore, guilty of manslaughter.

The cause of the child victim's death was rattlesnake envenomation. The snake bit Stevie as the direct result of defendant's conduct. Stevie was taken to the hospital for treatment, but despite medical care from four physicians and a host of supporting personnel, Stevie Kirkwood died. Even if there were intervening medical error, the error was not a defense to defendant because he inflicted a mortal wound on Stevie Kirkwood.

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT DEFENDANT RECKLESSLY CAUSED THE DEATH OF STEVIE KIRKWOOD AND IS GUILTY OF MANSLAUGHTER.

Defendant first claims that the death of Stevie Kirkwood was an accident for which he is not criminally responsible. In the alternative, he contends that his conduct, at most, constituted criminal negligence, and that he was improperly convicted of manslaughter.

Defendant's argument that Stevie's death was purely an accident for which he should not be held responsible (A.B. at 7) is without merit. As set forth in the statement of facts, defendant was aware that the rattlesnake was poisonous. He knew that it was a wild animal and could strike at any time. He held the snake at its midsection within inches of Stevie, despite her screams, and the snake bit her. Defendant can hardly seriously contend that this series of events was a fortuitous circumstance or happening for which there was no human agency. Defendant was not engaging in an act which was lawful and lawfully done under a reasonable belief that no harm was possible. This incident was, simply, not an accident for which defendant has no criminal responsibility.

A person commits manslaughter if he "recklessly causes the death of another." Utah Code Ann. § 76-5-205(1)(a) (Supp. 1987). A person commits negligent homicide if "acting with criminal negligence, [he] causes the death of another." Utah Code Ann. § 76-5-206 (1978). The crimes are a second degree felony and class A misdemeanor, respectively.

The definitions of the mens rea elements for these crimes are set-forth in Utah Code Ann. § 76-2-103, which states, in relevant part, that a person engages in conduct:

> (3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.
>
> (4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

The Utah Supreme Court explained the distinction between manslaughter and negligent homicide in State v. Dyer, 671 P.2d 142 (Utah 1983). The Court stated:

> The only difference between reckless and criminally negligent conduct is that under the former, one perceives a risk and consciously disregards it, whereas under the latter, one fails to even perceive the risk. The risk in both cases must be of such a degree that an ordinary person would not disregard or fail to recognize it. The distinction, then, is merely one of the degree of the perception of the risk.

Id. at 148. See also State v. Boggess, 655 P.2d 654 (Utah 1982); State v. Howard, 597 P.2d 878 (Utah 1979).

In State v. Bolsinger, 699 P.2d 1214 (Utah 1985), the Supreme Court found that the defendant had engaged in reckless conduct as the result of placing or pulling a cord around the victim's neck during sexual intercourse, a consensual act in an apparent attempt to heighten sexual response. The defendant intended no harm and there was no struggle. The defendant did not possess medical knowledge which made him aware that the victim's degree of intoxication could hasten her death. The Court found that the evidence did not support a conviction for second-degree murder but did support a conviction for manslaughter. There was "sufficient evidence that the defendant was aware of, but consciously disregarded a substantial and unjustifiable risk that placing and/or pulling a cord around the victim's neck would result in her death." Id. at 1219. The Court found the conduct to be a gross deviation from the standard of care that an ordinary person would exercise, even when viewed from the defendant's standpoint.

The issue in this case is the degree to which defendant perceived the risk--did he perceive a risk and disregard it, or did he fail to even perceive the risk?

Defendant claims that he simply did not perceive the risk, and bases his contention on his conduct in handling the snake (AB at 13). Defendant's conduct in handling the snake, however, does not establish that he failed to perceive the risk. Defendant was aware of the risk; he knew the snake was poisonous (T. 428), he knew the snake could strike at any time (T. 434), and he knew that people react differently to envenomation. (T.

437). Defendant's conduct in handling the snake establishes that he knew the risk and that he assumed it--not that he failed to perceive a risk. Because defendant was aware of and assumed the risk, he was at least reckless in his conduct.

As the Supreme Court stated in Dyer, "the difference [between negligent homicide and manslaughter] lies in making a judgment as to where on a continuum of unreasonable conduct one's behavior passes from negligence to recklessness." Dyer at 148. Additionally, one's "negligence may, in a particular case, quickly, even imperceptibly, aggravate on the scale of culpability to recklessness. State v. Boggess, 655 P.2d 654 (Utah 1982)(Stewart, J., concurring) quoting People v. Stanfield, 36 NY.2d 467, 330 N.E.2d 75, 369 N.Y.S.2d 118 (1975).

The facts show defendant's conduct was reckless. He had been drinking. The evidence is not clear as to precisely how much he had to drink, but does establish that defendant and Willis Kelton bought a bottle of tequila when they went to Cedar City to pay their open container tickets and apparently drank it all (T. 394). Defendant's consumption of alcohol likely caused him to be less cautious and careful than he may have ordinarily have been. However, his consumption of alcohol does not in any way minimize or excuse his behavior. Voluntary intoxication is not a defense in this case. If "recklessness or criminal negligence establishes an element of an offense and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense." Utah Code Ann. § 76-2-306 (1978). See also State v. Royball, 710 P.2d 168 (Utah 1985); State v. Bryan, 709 P.2d 257 (Utah 1985).

Ms. Kirkwood testified that after defendant had consumed the alcohol, defendant was acting "macho" and had to be the "center of attention because he . . . had a deadly animal on his shoulder just like Rambo would be packing a machine gun" (T. 18). It appears from defendant's conduct that trying to be the "center of attention" was precisely what he was doing. Over a period of more than an hour, defendant performed antics with the snake. He chased and taunted Ms. Kirkwood in an attempt to get her to hold it--despite her obvious revulsion and fear (T. 21-22). He performed for the school kids getting off the bus (T. 313-14, 469). He asked Vaughn Gubler and Allen Shelly if they wanted to hold the snake and called then "chicken" when they did not (T. 25, 475). It appears that the reaction of the spectators only exacerbated defendant's behavior.

Defendant knew the snake was poisonous (T. 428). He also knew the snake could strike if startled (T. 434). He knew the venom would cause physical effects; in fact, he carried a "snakebite kit" in his truck (T. 406). His awareness is further evidenced by the fact that immediately after the snake bit Stevie, he lacerated the fang hole in an attempt to extract the poison (T. 405, 428).

Defendant also knew the snake reacted to animals. He had the snake near dogs earlier that day, which had caused the snake to react (T. 434). Regardless, he took the snake into the bathroom where Stevie was playing with kittens (T. 402). This conduct further demonstrates defendant's knowledge of and disregard of the risk involved.

Defendant claims that he has never heard of anyone dying from a rattlesnake bite (T. 436). However, he admits that he has heard of people dying from bee stings (T. 436). By his own admission, he believes that a rattlesnake bite is like a "concentrated" bee sting and a person can become ill (T. 436). He also knows that people react differently to bee stings, and that some are more severely affected than others (T. 437). Also, he admitted to the investigator for the medical examiner, when interviewed soon after Stevie's death, that he was aware of the deadly poisonous nature of the snake (T. 253, 255). Consequently, defendant's attempt to minimize his knowledge regarding the deadly nature of rattlesnake venom is not persuasive.

Regardless of defendant's expressed belief concerning the deadly nature of the snake, he was informed on the date of the crime that the snake could kill. Walter Church, Ms. Kirkwood's neighbor from across the street, specifically warned defendant that the snake could kill. He told defendant that the snake was dangerous and that it could bite and kill someone (T. 83). He also told defendant that he should "do something about" the snake (T. 83). Nevertheless, defendant ignored the warnings and continued to engage in his reckless behavior.

Defendant further claims that because he was bitten by a rattlesnake when he was a child of five years and suffered no major ill-effects (although he was taken to the hospital), he would not have known that this snake was dangerous (A.B. at 23; T. 376-77). However, the snake which bit defendant was a

sidewinder and was only twelve to eighteen inches long (T. 378). Furthermore, he was bitten on the finger (T. 378). The size of the snake and the location of the bite are important factors. As Mr. Glen, the research serpentologist, explained, the size of the snake and the location of the bite are important to survival. If a small child gets bitten on the trunk of the body or near the neck, the chance of death is increased. The snake in defendant's possession was unusually large, measuring about forty-two inches (T. 486). There is no question that defendant knew the age and size of the child (T. 383). He also knew people react differently to envenomation. (T. 437). Regardless, defendant draped the snake over Stevie's shoulder, and, as Willis Kelton put it, stuck the snake in her face (T. 295, 321). Further, he held the snake only by its midsection (T. 254); he did not even attempt to exercise control over the snake's ability to strike out at Stevie. He also looked away from Stevie, to look at Jeri, allowing the snake to strike (T. 404). Defendant's argument that he was unaware of the risk is not persuasive when juxtaposed to his knowledge and behavior.

Defendant's expert witness testified that there have been six deaths caused by rattle snake envenomation in the State of Utah since 1900 (T. 489). The witness' testimony is irrelevant to this defendant's state of mind at the time in question. Defendant did not have the benefit of these statistics when his conduct caused the snake to bite Stevie. Further, despite the infrequency of death as the result of rattlesnake bites, such deaths do, indeed, occur. The rattlesnake

envenomation was unquestionably the cause of death in this case (T. 160, 226). Death from different kinds of poison may, indeed, be rare. However, it does not change the deadly nature of the poison or justify one's needless exposure to the risk. Defendant did not have the benefit of his expert's statistics; he did, however, have the benefit of knowing that the snake was poisonous, that it could strike at any time, and that, as he put it, a rattlesnake bite is a concentrated bee sting and even been stings can be fatal.

Additionally, Mr. Glen, was given a hypotethical question in which defendant's conduct in this case was presented to him. Based on his experience, Mr. Glen testified that defendant's conduct created a substantial risk of death (T. 518-19).

As the Supreme Court stated in State v. Howard, 597 P.2d 878, 881 (Utah 1979), the degree of the defendant's perception of the risk and his subjective intent is a question of fact to be determined by the trier of fact. See also State v. Watts, 675 P.2d 566 (Utah 1983). In this case, the trial court, sitting without a jury, determined that defendant did not intentionally or with depraved indifference kill Stevie, but he was reckless when engaging in the conduct that caused Stevie's death (T. 2/24/88 at 6-7). The standard of review of verdicts from bench trials is subject to the "clearly erroneous" standard, rather than the standard for jury trials in which an appellate court will overturn the verdict only when the evidence is so lacking and insubstantial that a reasonable person could not have

reached the verdict beyond a reasonable doubt. State v. Walker, 743 P.2d 191 (Utah 1987); State v. Fowler, 745 P.2d 472 (Utah App. 1987). When examining the trial court's determination that the evidence was sufficient to take defendant's conduct on the continuum from negligence to recklessness, this Court should find the evidence sufficient. Given the sufficiency of the evidence on this point, the trial was not "clearly erroneous" in finding defendant's conduct met the standard for recklessness.

While the trial court's choice words may have been, on occasion, confusing as the to legal standard he was applying in finding defendant guilty of manslaughter, this Court should still uphold the verdict. When applying the standard for recklessness, it becomes clear that the facts establish the requisite mens rea. Even when viewed from defendant's standpoint, an ordinary person would not have failed to have perceived the risk. This Court need not rely upon the trial court's choice of words in finding defendant was reckless and can use any appropriate grounds to uphold the verdict. Jones v.State, 602 P.2d 378 (Wyo. 1979).

The State does not contend that defendant did not care for Stevie or Ms. Kirkwood, or that he intended to cause her harm or death. However, the facts establish that he was aware of a substantial and unjustifiable risk that the circumstances existed. The risk was substantial; the snake was large and poisonous and the child was small. Further the risk was unjustifiable. Unlike driving a car or climbing a ladder as defendant analogizes (AB at 22), defendant's conduct in thrusting the snake in Stevie's face had absolutely no utility. The risk

was unjustifiable. Defendant's conduct was a gross deviation from the standard of care. Even when viewed from the defendant's standpoint, an ordinary person would not have failed to perceive the risk.

When applying the standard for a determination of recklessness, it becomes clear that, indeed, defendant's conduct was, at a minimum, reckless. When viewing the conduct on the continuum spoken about the Dyer Court, it becomes clear that the risk was more than something that defendant ought to have been aware of. He was, indeed, aware of the risk but chose to disregard it.

POINT II

THE DEATH OF STEVIE KIRKWOOD RESULTED PROXIMATELY FROM THE VENOMOUS SNAKEBITE, AND THE MEDICAL INTERVENTION DOES NOT EXCUSE DEFENDANT FROM HAVING CAUSED STEVIE'S DEATH.

Defendant contends that the medical treatment Stevie Kirkwood received upon her admission to the hospital became an intervening cause of her death and that the alleged negligence of the treating physicians should constitute a defense to his manslaughter conviction. This contention is erroneous and is not supported by the record or by controlling case law of this state. Furthermore, State v. Velarde, 734 P.2d 449 (Utah 1986), established that even when there is medical error it is no defense to a defendant who had inflicted a mortal wound.

In Utah, the State has the burden in a homicide case of proving beyond a reasonable doubt that the death of the victim resulted proximately from some act or omission of the defendant. State v. Bassett, 27 Utah 2d 272, 274, 495 P.2d 318, 319 (1972).

If the injury inflicted contributes immediately to the death of the victim, the defendant is guilty of homicide. State v. Fierro, 124 Ariz. 182, 185, 603 P.2d 74, 77-78 (1979); Velarde at 456.

In this case, the State presented sufficient evidence to prove beyond a reasonable doubt that defendant's conduct in allowing the poisonous snake to attach to Stevie's neck contributed immediately to her death. The medical examiner for the State of Utah, Dr. Sweeney, testified that the cause of Stevie's death was the venomous snake bite (T. 159-61). In addition, defendant's witness Dr. Dart, an attending physician for the Arizona State Poison Control Center, also testified that Stevie died from the snake bite (T. 218). The uncontroverted testimony of these two witnesses demonstrates beyond a reasonable doubt that Stevie died as a direct result of venomous snakebite.

Stevie was treated by four physicians and various other medical personnel when she arrived at the hospital (T. 108). The doctors exercised their best judgment, given the situation at the time and the clinical signs of improvement after administration of the antivenin (T. 121, 131). Even according to defendant's expert witness, the medical personnel did not do anything to cause Stevie's death (T. 222), the slow administration of the antivenin was an acceptable medical practice (T. 202-03), and that there was no gross negligence (T. 237).

However, even if this Court should construe the care Stevie received at the hospital as a contributing factor to her death, defendant remains responsible. "[I]ntervening medical

error is not a defense to a defendant who has inflicted a mortal wound upon another." Velarde at 456.

Defendant asserts that Velarde is not applicable here and attempts to distinguish it from the instant facts on the ground that the venomous snake bite should not have been a mortal wound. Although the evidence adduced at trial does suggest that a rattlesnake bite may not be as fatal as is popularly believed, defendant's assertion fails as applied to the particular facts of this case. Both Dr. Dart and Dr. Callahan testified regarding the increased danger of a snake bite to a small child. Defendant's witness, Dr. Dart, stated that he would expect a child in the ten to fifteen kilogram range, like Stevie, to be at a "substantial risk of death" (T. 255). Similarly, State's witness, Dr. Callahan, stated that the smaller the body of the victim, the greater the danger of death from envenomization. (T. 110-11). Additionally, the research serpentologist, James LeRoy Glen, testified about the increased risk for children (T. 493). Nonetheless, defendant attempts to distinguish Velarde from the present facts asserting that the victim in Velarde would have died regardless of whether he received medical treatment. Defendant asserts that Stevie might have survived with different medical treatment and therefore he is not responsible for her death. However, in this case, as in Velarde, subsequent medical treatment simply failed to preserve the victim's life. The mere possibility that different medical treatment might have brought about a different result is too uncertain a foundation to support defendant's contention that the snakebite should not have been a mortal wound.

Based upon the above, Velarde is dispositive of the issue here. The alleged medical error of the treating physicians does not constitute a defense for defendant. Once a defendant inflicts a mortal wound, he is not entitled to the benefit of medical science--even at its most basic level--to reverse the chain of events he has set into motion.

Courts in other jurisdictions have also examined this issue, and some have determined that the adequacy of a victim's medical care may have some relevance under limited circumstances. The Supreme Court of Arizona considered the issue of medical malpractice in State v. Sauter, 120 Ariz. 222, 585 P.2d 242 (1978).

> ". . . [I]t is the generally recognized principle that where a person inflicts upon another a wound which is dangerous, that is, calculated to endanger or destroy life, it is alleged no defense to a charge of homicide that the victim's death was contributed to by, or immediately resulted from, unskillful or improper treatment of the wound or injury by the attending physicians or surgeons."

Id. at 243, quoting People v. Stamps, 8 Ill.App.3d 896, 291 N.E.2d 274, 279-80 (1972).

The Sauter court further stated that only if the death of the victim is attributable solely to the medical malpractice and is not induced at all by the original wound will the intervening treatment constitute a defense. Id. at 244 (citations omitted).

The Supreme Court of Colorado requires that the intervening medical treatment constitute gross negligence before it is available as a defense for the defendant.

> [M]ere negligence on the part of the attending physician does not constitute a defense. . . . [M]ere medical negligence can reasonably be foreseen. We hold, however that gross negligence is abnormal human behavior, would not be reasonably foreseeable, and would constitute a defense, if, but for that gross negligence, death would not have resulted.

People v. Calvaresi, 188 Colo. 277, 534 P.2d 316, 319 (1975)(emphasis added).

The reasoning set forth in both Sauter and Calvaresi suggests that some degree of a doctor's negligence is foreseeable and cannot be used by a defendant to exonerate himself on the ground that different or more skillful treatment might have preserved the victim's life. Only if the doctor's care is grossly negligent and is the actual cause of death, is the medical treatment a possible defense.

The State proved all elements of manslaughter beyond a reasonable doubt. Defendant has not shown that the care Stevie received at the hospital contributed solely to her death or constituted gross negligence. The record in this case does not support such an argument.

Dr. Foxley and Dr. Callahan implemented what in their judgment seemed the safest course of treatment for the snakebite only after careful consideration of several factors, including Stevie's size, and the threat of anaphylactic shock from the antivenin increases if too much antivenin was administered too quickly (T. 105, 240-41). Therefore, three vials of antivenin were prepared for initial administration through the intravenous line, with the intention of administering additional antivenin as

needed (T. 11-17). After this initial dosage, Stevie gradually improved in general appearance and quieted down (T. 108). She was then transferred from the emergency room to an intensive care unit (T. 111-17, 132-33). Shortly thereafter, Stevie suffered respiratory arrest (T. 108, 173).

Defendant also claims that improper intubation was an intervening cause of Stevie's death. Michael Kesler, a registered nurse anesthetist, was called to the ICU to intubate Stevie to guard her airway during the respiratory arrest (T. 173). Mr. Kesler testified concerning the procedural protocol involved in intubating a patient to guard against improper placement of the tube. Imediately after intubation occurs, Mr. Kesler routinely checks the patient for proper chest movement (T. 177-78). When he is satisfied with that, Mr. Kesler checks to see if the stomach is distended (T. 183). He then listens to both sides of the lungs for breath sounds (T. 178, 182-83). In addition to these precautions, Mr. Kesler checks the endotracheal tube itself for signs of humidification and condensation which show that the patient's breathing is normal (T. 183). Mr. Kesler routinely performs these safety procedures after he completes an intubation and before the tube is taped in place (T. 178, 182-83).

Mr. Kesler followed the requisite procedures in this case (T. 182-83). Dr. Callahan also checked Stevie to make sure the intubation was done correctly (T. 151). Even defendant's witness, Dr. Dart, testified that Kesler followed the correct procedures and there is no evidence that Kesler improperly

intubated Stevie (T. 218-19). The blood gas tests indicated that Stevie was in distress (T. 212). However, improper intubation was only one possibility, and there could be other explanations as well (T. 213). According to Kesler, the blood gas tests were a reflection of the horrible condition Stevie was in and were not necessarily an indication that the tube had slipped into her stomach (T. 179-180).

Upon reviewing Stevie's care at the hospital, defendant's witness, Dr. Dart, testified that the treating physicians had done nothing that would have caused Stevie's death (T. 222). Dr. Dart further testified that the slow administration of the antivenin was an acçeptable medical practice and that the care of the physicians did not constitute gross negligence (T. 202-03, 237). With the benefit of hindsight, the treating physicians may have done things differently. However, defendant was not entitled to the benefit of any medical intervention to stop the chain of events he set into motion when he caused the mortal wound. That the physicians intervened but did not save Stevie's life does not lesson defendant's capability or mitigate his reckless conduct.

CONCLUSION

The defendant, Darrell Lawrence Wessendorf, was properly convicted of manslaughter. For the foregoing reasons and any additional reasons advanced at oral argument, the State

of Utah respectfully requests that this Court affirm defendant's conviction.

RESPECTFULLY submitted this 9th day of February, 1989.

R. PAUL VAN DAM
Utah Attorney General

BARBARA BEARNSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to J. MacArthur Wright, attorney for defendant, 60 North 300 East, P.O. Box 339, St. George, Utah 84660, on this 9th day of February, 1989.